the operation of the presumption to limited facts is obviously to make it accord with the inferential value of those facts. In making the presumption reasonable it is made unnecessary.

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MEASURE OF DAMAGES FOR FAILURE OF VENDOR OF REALTY TO GIVE TITLE.—The measure of damages for breach of a contract for the sale of personalty is everywhere the difference between the contract price and the market value on the date of performance. The exceptional rule in contracts to sell realty or to give a lease, restricting recovery under certain circumstances to the consideration money paid with interest, is based upon two lines of reasoning. In England, the exception as laid down in *Flureau* v. *Thornhill*[1] was established because of the highly complicated development of the law of real property, the consequent practical impossibility for a layman to know the state of his title without expensive prior investigation, and the hesitancy with which vendors would put land upon the market if compelled to respond in substantial damages.[2] The parties were taken to have acted with these circumstances in mind, and the contracts were considered to have been made upon the implied condition of title in the vendor.[3] The extent of the exception was there for a long time the subject of dispute. Originally applied in *Flureau* v. *Thornhill* to a case in which a vendor found after making the contract a flaw in his title, its application was later denied where the vendor had no legal title at all, but only a contractual right to a conveyance.[4] A later case refused to give only nominal damages because the vendor was guilty of bad faith,[5] *Flureau* v. *Thornhill* having specified fraud as a ground for substantial damages. And where the vendor *bona fide* believed he had a legal title, though in fact he had only an equitable one,[6] and where a landlord mistaking the legal effect of an ejectment suit thought he could give possession,[7] substantial damages were refused. It was therefore, a disputed question whether the application of *Flureau* v. *Thornhill* depended upon the vendor's believed ownership of the property at the time the contract was made or upon his *bona fide* expectation of having the property by the time of performance.[8] The former view was criticized as the result of Lord Tenterden's now exploded theory that a contract to sell property to which the vendor had only a contractual right was illegal, and it was properly doubted whether even bad faith could be the basis of substantial damages where the contract was conditioned upon the making of good title.[9] The hostility of the courts to the limitation of the rule of *Flureau* v. *Thornhill* culminated in *Bain* v. *Fothergill*,[10] in which the

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[1](1776) 2 Wm. Bl. 1078.

[2]Sikes *v.* Wild (1861) 1 B. & S., 587.

[3]Flureau *v.* Thornhill, *supra;* Walker *v.* Moore (1829) 10 B. & C. 416; Worthington *v.* Warrington (1849) 8 C. B. 133.

[4]Hopkins *v.* Grazebrook (1826) 6 B. & C. 31.

[5]Robinson *v.* Harmon (1848) 1 Ex. 849.

[6]Pounsett *v.* Fuller (1856) 17 C. B. 658.

[7]Buckley *v.* Dawson (1854) 4 Irish C. L. R. 211.

[8]See Pounsett *v.* Fuller, *supra;* Engel *v.* Fitch (1868) 9 B. & S. 85; Sikes *v.* Wild, *supra.*

[9]See Sikes *v.* Wild, *supra.*

[10](1873) L. R. 7 E. & I. App. 158.

House of Lords overthrew the first view and created uncertainty as to the existence of any limitation at all upon the rule. But, though Lord Chelmsford advanced the idea that bad faith founded only an action for deceit, it has lately been held, in accord with the apparent attitude of the other judges, that bad faith, consisting either in fraud or wilful refusal to make title justifies substantial damages.[11]

In this country the reasoning of those jurisdictions which refuse to apply the usual measure of damage in contracts of sale is based upon the analogy to the rule giving only nominal damages for the breach of covenants of warranty, seisin, or quiet enjoyment, in executed contracts.[12] It is not, however, everywhere agreed that the proper measure of damages for breach of a covenant of warranty, to which the New York courts specifically refer, is the consideration alone.[13] Moreover, the usual measure of damages in such cases is of historical origin, being the outgrowth of the older common law rule, at a time when land values did not fluctuate, requiring a grantor to replace an evicted grantee with lands equal in value.[14] A covenant of seisin is broken when made, and hence hardly analogous. The objection that the vendor may be held for excessive damages for increase in value or improvements, of weight in covenants of warranty or for quiet enjoyment which may not be broken in some time, loses force in contracts of sale which contemplate immediate conveyance.[15] And to Judge Cooley's argument that a dishonest vendor may conceal the defect in title and give a conveyance, thus freeing himself from substantial damages,[16] may be answered the usual practice of vendees to examine the title.

The general tendency in this country, however, has been to apply the true rule of damages. In Maine, where substantial damages are given for breach of covenant of warranty,[17] and in many western states, where land titles are not complex as in England,[18] the reason for the exception failing, the true rule is adhered to. Other courts have not questioned its uniform application to realty as well as to personalty.[19] And, although some states in which the exception is recognized, have by judicial decision or statute[20] made the *bona fides* of the vendor the test, the New York and New Jersey courts discountenance the exception, and upon the authority of the English case of *Hopkins* v. *Grazebrook*,[4] since overruled,[10] refuse to apply it where the vendor knows that his power to convey a good title depends upon a known contingency not within his control.[21]

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[11]Day *v.* Singleton, L. R. [1899] 2 Ch. 320.

[12]Thompson's Exr. *v.* Guthrie's Adm. (Va. 1837) 9 Leigh 101; Peters *v.* McKeon (N. Y. 1847) 4 Denio 546.

[13]Gore *v.* Brazier (1807) 3 Mass. 523; Hardy *v.* Nelson (1847) 27 Me. 525.

[14]Staats *v.* Executors of Ten Eyck (N. Y. 1805) 3 Caines 111.

[15]Pumpelly *v.* Phelps (1869) 40 N. Y. 59.

[16]Hammond *v.* Hannin (1870) 21 Mich. 374.

[17]Doherty *v.* Dolan (1876) 65 Me. 87.

[18]Beck *v.* Staats (Neb. 1908) 114 N. W. 633; Hartzell *v.* Crumb (1886) 90 Mo. 629; Vallentyne *v.* Immigration Land Co. (1905) 95 Minn. 195; Dunshee *v.* Geoghegan (Utah 1891) 25 Pac. 731.

[19]Hopkins *v.* Lee (1821) 6 Wheat. 109; Wells *v.* Abernethy (1824) 5 Conn. 222; Irwin *v.* Askew (1885) 74 Ga. 581; Brigham *v.* Evans (1873) 113 Mass. 538; Plummer *v.* Rigdon (1875) 78 Ill. 222.

[20]Foley *v.* McKeegan (1856) 4 Ia. 1; Dal *v.* Fisher (1906) 20 S. D. 426; Yates *v.* James (1891) 89 Cal. 474.

[21]Pumpelly *v.* Phelps, *supra;* Drake *v.* Baker (1871) 34 N. J. L. 358.

In striking contrast with this attitude is a recent Texas case, *Clifton* v. *Charles* (Tex. 1909) 116 S. W. 120, in which, despite the conscious misrepresentation by the vendor that he owned land which belonged to others, only nominal damages were granted. The vendee's only remedy is apparently an action in tort. While the decision has the merit in logic of disregarding the vendor's motive, it is hardly supported by the earlier Texas cases,[22] and is in conflict with the otherwise universal practice of giving substantial damages in case of the vendor's fraud or wilful refusal to convey.[23]

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THE RIGHT TO QUESTION THE CONSTITUTIONALITY OF A LAW.—The reluctance of the courts to pass upon the constitutionality of legislative enactments is traceable to the considerations once thought to negative the existence of this inferential power. As late as 1825, it was urged that the legislative and judicial, being co-ordinate departments of the government, the recognition in the latter of a right to revise the acts of the former would subordinate the one to the other, thus overthrowing the system of checks and balances.[1] Nevertheless, following the familiar practice of the English courts of overruling laws in conflict with the Colonial Charters,[2] this power of judicial revision, sanctioned by necessity,[3] came to be generally recognized in the United States, though repudiated in continental countries under written constitutions. Mindful, however, of the danger of its abuse, the courts have refrained from exercising it except within the narrowest limits.[4] Its scope is strictly judicial,[5] and an opinion of the constitutionality of a law will not be given, nor even formed, until the question is raised in the form of serious litigation. A friendly[6] or fictitious[6] suit is not enough. Despite the possibility of an indefinite enforcement of an unconstitutional law before some private individual assumes the burden of questioning it, the judiciary cannot act until an attempt is made to use it as an instrument for maintaining rights supposed to have been created by a statute, or for the defense of a constitutional right which would be violated by the enforcement of a statute.[7] If the law in question is then, beyond a reasonable doubt, in excess of legislative authority, it is simply disregarded, and the constitutional decision is found in the reasons assigned for the judgment.[8] In no proper sense, therefore, is it true, as frequently stated, that the courts were established as a check upon the legislature. Any other principle than that the decision of a constitutional question is merely incidental to a determination of the rights of *bona fide* litigants would lead the courts from the domain

[22]Sutton *v.* Page (1849) 4 Tex. 142; Hall *v.* York's Admr. (1859) 22 Tex. 642; Wheeler *v.* Styles (1866) 28 Tex. 240; Roberts *v.* McFadden (1903) 32 Tex. Civ. App. 47.

[23]Allen *v.* Atkinson (1870) 21 Mich. 251; Driggs *v.* Dwight (N. Y. 1837) 17 Wend. 71; Kirkpatrick *v.* Downing (1874) 58 Mo. 32; Tracy *v.* Gunn (1883) 29 Kan. 508.

[1]Dissenting opinion of Gibson, J., Eakin *v.* Raub (Pa. 1825) 12 S. & R. 330, 344.

[2]7 Harv. L. Rev. 130.

[3]Cooley, Const. Lim. (7th Ed.) 228, 229.

[4]Calder *v.* Bull (1798) 3 Dall 386, 399.

[5]Chicago etc. Ry. Co. *v.* Wellman (1892) 143 U. S. 339, 345.

[6]Brewington *v.* Lowe (1848) 1 Ind. 21, 23.

[7]5 Pol. Sci. Quart. 255.

[8]Dicey, Law of the Const. 150.